89- 1381

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES R. ENDRESS

Petitioner,

vs.

RICHARD DUGGER
DIRECTOR, DIVISION OF CORRECTIONS,
STATE OF FLORIDA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief for Petitioner

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QUESTIONS PRESENTED

1. Is a State Court's finding that a criminal defendant has not been interrogated entitled to a presumption of correctness pursuant to 28 U.S.C. Sec. 2254(d) when the State Court's finding is brought under review by a Petition for Writ of Habeas Corpus?

2. Is a criminal defendant illegally interrogated when a detective, in full uniform, visits the defendant in jail and illicits statements from the defendant?

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Petitioner,

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RICHARD DUGGER
DIRECTOR, DIVISION OF CORRECTIONS,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, James R. Endress, (hereinafter "Mr. Endress"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above referenced matter on August 21, 1989 (Petition for Rehearing denied on December 7, 1989).

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 880 F.2d 1244 (11th Cir. 1989) and reproduced in the Appendix hereto (App. A, at 1a). The order of the United States District Court denying Mr. Endress' Petition for Writ of Habeas Corpus is reproduced at (App. C, at 10a). The United States Magistrate's Report and Recommendation on Mr. Endress'

Petition for Writ of Habeas Corpus is reproduced at (App. D, at 11a). The decision of the State Court is reported at 462 So.2d 872 and is reproduced at (App. E, at 17a).

JURISDICTION

Mr. Endress' petition seeks review of the Judgment of the Court of Appeals entered on August 21, 1989 (App. B, at 9a). By Order dated December 7, 1989, the Eleventh Circuit denied Endress' Petition for Rehearing (App. F, at 20a). This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same to be twice put in jeopardy of life or limb; nor shall be compelled to in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution:

(Sec. I) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. 28 U.S.C. 2254;

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that an applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed

at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) through (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest on the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent

to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

A. Nature of the Case.

James R. Endress petitioned for a Writ of Habeas Corpus from the United States District Court for the Middle District of Florida, Tampa Division, alleging that he was being illegally incarcerated by the Respondent. The jurisdiction of the district court was invoked under 28 U.S.C. 2254(d), providing for Petitions for Writs of Habeas Corpus to be filed in federal district court.

B. The facts of the case.

Mr. Endress was charged in a one-count indictment on November 12, 1981 (R2-14-1).* This count charged him with Murder from a Premeditated Design, in violation of Florida Statute, Sec. 782.04, (R2-14-1).

Mr. Endress complained in his Petition for a Writ of Habeas Corpus from the United States District Court for the Middle District of Florida that the state trial court erred in denying his Motion to Suppress custodial statements illegally obtained by Detective Hunt of the Hillsborough County, Florida, Sheriff's Department (R2-14-1). These custodial statements were obtained during two interrogation sessions initiated by Detective Hunt at the Hillsborough County Jail (R2-14-1).

Mr. Endress was arrested on October 28, 1981 by Detectives Reynolds and McAllister of the City of Tampa Police Department on the charge of First Degree Murder (R1-3-73,74). In accord with this arrest, the detectives had a prior agreement with Mr. Endress' father, wherein they agreed they would not question Mr. Endress until he could meet with his father at the police station (R1-3-74). Mr. Endress was then advised of his Miranda rights and transported to the Tampa Police Department by the detectives (R1-3-74).

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* References are to the record on appeal.

After Mr. Endress was taken to the police station, Detectives Reynolds and McAllister were informed that he wanted to speak to an attorney prior to answering any questions or making any statements (R1-3-81, 82). Mr. Endress was then taken to the Hillsborough County Jail where he was booked without bond on the charge of First Degree Murder (R1-1-3).

Later the same day of his arrest, Detective Don Hunt of the Hillsborough County Sheriff's Office, learned of the arrest of Mr. Endress for First Degree Murder. Detective Hunt knew Mr. Endress and his family because they were members of the same church (R1-3-41). On his own initiative, Detective Hunt sought and received permission from his superior officers at the Sheriff's Office to go back into the jail and find Mr. Endress for the purpose of talking to him (R1-3-41, 42). Detective Hunt, while in uniform, sought out and found Mr. Endress on the second floor of the jail (R1-3-42). Upon locating Mr. Endress in the jail, Detective Hunt conversed with him for approximately fifteen minutes (R1-3-45). During this custodial conversation, Detective Hunt found Mr. Endress in such a disturbed emotional state that Mr. Endress cried while the detective was talking to him (R1-3-47, 52-53). The entire episode took place inside the jail while the detective was in uniform.

After this first custodial interrogation session by Detective Hunt, the Detective returned again the next day to find Mr. Endress and further converse with him (R1-3-4).

During Detective Hunt's interrogation sessions with Mr. Endress, the detective elicited from Mr. Endress that a man named Wade gave him and a fellow named Ronald one hundred and seventy dollars to purchase a gun. The detective further elicited that Mr. Endress and Ronald purchased a .32 caliber pistol for seventy or ninety dollars and that Wade let them keep the balance of the money (R1-3-12).

After discussing the jail processing and promising to get back with Mr. Endress with some information (R1-3-12), Detective Hunt further elicited from him that the man named Wade wanted

him to buy the gun because he wanted his wife killed since she knew that he (Wade) had killed somebody in Norfolk, Virginia and she was "bugging him about it" (R1-3-13, 14).

As a result of eliciting these statements from Mr. Endress, Detective Hunt immediately prepared an inter-office memorandum on this interrogation information and gave it to his supervisor so that it could be turned over to the City of Tampa Police Department for use in their investigation (R1-3-60). After submitting this memorandum, Detective Hunt was then immediately summoned to the Detective Division of the Tampa Police Department for the purpose of debriefing on the intelligence he had gathered through his conversations with Mr. Endress while he was in custody in the jail (R1-3-60 thru 69).

Detective Hunt promptly responded to the police inquiry and travelled to the police department with a major from the Sheriff's office so that complete details of the information learned from Mr. Endress could be submitted to the police detectives for their use in the pending murder investigation (R1-3-60 thru 69, 85). Mr. Endress was then indicted for First Degree Murder on November 12, 1981 (R1-1-5).

A pre-trial Motion to Suppress the Statements of Mr. Endress which were illegally elicited by Detective Hunt was filed on August 29, 1983 (R1-1-6). This Motion alleged that on or about October 28 and 29, 1981, Detective Hunt initiated and conducted two custodial interrogation sessions with Mr. Endress while he was incarcerated in the Hillsborough County Jail (R1-1-6). At the evidentiary hearing on this Motion, Detective Hunt admitted he initiated the two meetings with Mr. Endress, and that he was in his Sheriff's uniform when he met with him. Detective Hunt further admitted that he never advised Mr. Endress of his constitutional rights as outlined under *Miranda* (R1-3-42, 43). The trial court denied the Motion to Suppress the statements illegally obtained on September 14, 1983 (R1-3-13- 141) and the trial commenced on September 19, 1983 (R1-1-6).

At trial, the State called Detective Don Hunt as its last witness

(R1-3-0). Detective Hunt testified to, and reiterated for the jury, the statements he had illegally elicited from Mr. Endress during his two custodial interrogation sessions with him at the time of his arrest (R1-3-9). These were the same statements which Mr. Endress sought to suppress in his pre-trial motion. Mr. Endress renewed his objection to Detective Hunt's testimony as it pertained to illegal custodial interrogation statements. This objection was noted by the court and overruled (R1-3-10, 11). At the conclusion of the State's case, Mr. Endress made a Motion for Judgement of Acquittal (R1-3-34). Mr. Endress then exercised his constitutional right not to present any evidence (R1-3-42).

The case was then submitted to the jury for its consideration (R1-3-110). After more than two hours of deliberation, the jury requested that Detective Hunt's testimony be read back to them (R1-3-111). The state trial court granted the jury's request and Detective Hunt's testimony was read back to the jury over Mr. Endress' objection (R1-3-114). The jury returned a verdict of guilty as charged and Mr. Endress was subsequently sentenced to life in the Florida State Prison with no parole for a minimum of twenty-five years (R3-28-5).

Immediately following the imposition of sentence, Mr. Endress filed a Notice of Appeal (R3-28-5) and prosecuted his appeal according to law. The state trial court's decision was affirmed. Subsequently, Mr. Endress filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida (R1-1-1). This petition alleged that Mr. Endress' confession was obtained in violation of his Fifth and Fourteenth Amendment rights against self-incrimination (R1-1-14). In consideration of this petition a magistrate of the District Court filed a Report and Recommendation. The recommendation of this Report and Recommendation, which was the subject of the appeal to the Eleventh Circuit Court of Appeal, was that Mr. Endress' Petition for Writ of Habeas Corpus be denied (R3-27-8). The Report and Recommendation based this conclusion on the fact that the state trial court had found that there had been no interrogation of Mr. Endress, thus his statements were considered to be voluntary (R3-27-5).

The order of the District Court denied Mr. Endress' Petition for Writ of Habeas Corpus (R3-29-1). In doing so, it specifically stated that the magistrate's Report and Recommendation had been take into consideration in making that order (R3-29-1). The judgement of the appellate court affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER A STATE COURT FINDING THAT THERE HAS BEEN NO INTERROGATION OF A CRIMINAL SUSPECT IS ENTITLED TO A PRESUMPTION OF CORRECTNESS PURSUANT TO 28 U.S.C. Sec. 2254 (d) REQUIRES CLARIFICATION BY THIS COURT.

The magistrate inappropriately afforded a presumption of correctness in favor of the state court's finding that Mr. Endress was not interrogated by Detective Hunt. The Report and Recommendation acknowledges that the ultimate issue of whether a confession was obtained in violation of the Fifth and Fourteenth Amendments is a mixed question of law and fact to which a State Court's determination is not entitled to a presumption of correctness.

The Report and Recommendation quoted at length from the state appellate court's decision ruling that Mr. Endress had not been interrogated. The Report and Recommendation went on to state: "The factual finding of the appellate court that Detective Hunt did not interrogate petitioner concerning the crime for which he was charged demonstrates that no express questioning occurred", thus granting to the state appellate court's finding a presumption of correctness.

In essence, the magistrate concluded that the issue of whether Mr. Endress was interrogated by Detective Hunt during the two jail visits was nothing more than a factual question. As a strict factual question, the state court's finding of interrogation would be presumptively correct pursuant to 28 U.S.C. Sec. 2254 (d).

On the other hand, if the determination of "interrogation"

were considered to be a mixed question of law and fact, the state court's findings on this issue would not be entitled to a presumption of correctness. Therefore, the seminal question is whether the finding of "interrogation" is strictly a question of fact or whether it is a mixed question of law and fact.

The benchmark case of *Miller v. Fenton*, 474 U.S. 104 (1985) must be consulted for guidance on this issue. The Court in *Miller* resolved a conflict among the circuits by determining in an 8-1 majority opinion that the issue of voluntariness of a confession is a mixed question of law and fact that should be independently reviewed by the federal courts in a habeas corpus setting. The Court's discussion of what is strictly a factual question as opposed to a mixed question of law and fact is instructive. The Court distinguished the "mixed" issue of voluntariness from the subsidiary factual questions.

The Court wrote:

> To be sure, subsidiary factual questions such as whether a drug has the properties of a truth serum...or whether in fact the police engaged in the intimidation tactics alleged by the defendant...are entitled to the presumption.

The specific type of fact specific issues which are entitled to the presumption are far removed from the ultimate issue of interrogation in the instant case. This distinction was underscored in *Ballard v. Johnson*, 821 F.2d 568 (11th Cir. 1987), a habeas corpus proceeding.

The court in *Ballard* found that the timing of an interrogation was in question, and that this issue had been specifically addressed by the state court. The *Ballard* court found that the issue of timing was merely a "circumstance of interrogation" *Id.* at 571. As such, the state court's finding was entitled to the presumption. If the *Ballard* court had not thought the question of interrogation is a mixed question, it would not have distinguished the timing question as one which was only a "circumstance of interrogation".

In the present case, the ultimate question addressed by the state appellate court was whether an interrogation had occurred. To support this conclusion it made some specific factual findings:

1. Detective Hunt noticed on a booking slip that Mr. Endress was in jail on the charge of first degree murder.

2. Detective Hunt had been good friends with Mr. Endress.

3. Detective Hunt sought permission for a personal visit with Mr. Endress so as to inquire of his well being.

4. Prior to the initial visit, Detective Hunt had not contacted the investigating law enforcement agency.

These above listed findings are specific factual findings that should be afforded a presumption of correctness. These type of findings are what the *Ballard* court referred to as "circumstances of interrogation."

The ultimate issue derived from those facts is whether an interrogation occurred. This is a mixed question of law and fact just as the question of voluntariness addressed in *Miller* is a mixed question.

Inherent in the cases in which the existence of an interrogation is at issue is that determination of this issue involves a careful analysis of the actions of the interrogator. In this analysis a consideration of the defendant's Fifth and Fourteenth Amendment rights against self-incrimination is made and applied to the actions and words of the interrogator. Only after the application of legal rule of law to these actions and words have the courts ventured to determine whether or not an interrogation has taken place.

It cannot be questioned that determination of whether or not certain acts or words constitute interrogation is so laden with legal considerations that it is a mixed question of law and fact, rather than one solely of fact.

The issue of interrogation is easily distinguishable from those

subsidiary factual questions the *Miller* court spoke of. The examples of subsidiary factual questions given by the *Miller* court show that these are questions in which the law of the physical world are the beginning and end of any inquiry into their answers. Rule of law plays no part in their answer.

No case has been decided by this court which addressed the issue of whether an interrogation is a factual question or mixed question for the purposes of applying 28 U.S.C. 2254(d). This important issue requires clarification by this Court to provide guidance to the lower courts in enforcing the Fifth Amendment to the Constitution and insuring that no defendant is interrogated against his will.

II. THE APPELLATE COURT ERRED WHEN IT RULED THAT MR. ENDRESS HAD NOT BEEN INTERROGATED.

The Report and Recommendation not only erred in the above issue, but correspondingly erred in recommending that Mr. Endress' Petition for Writ of Habeas Corpus be denied. Mr. Endress' claim of error is not an empty one in that his confession was illegally obtained. Correspondingly, the appellate court also erred in its ruling that Mr. Endress was not interrogated.

The issue now before the Court raises a question which goes to the roots of our concepts of American criminal jurisprudence: The admissibility of statements obtained from an accused who is subjected to covert police custodial interrogation, and the necessity for protection to assure that he is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

The Fifth Amendment to the United States Constitution guarantees the privilege against compulsory self-incrimination. A Fifth Amendment analysis in this case must begin with the much-cited landmark decision of *Miranda v. Arizona*, 384 U.S. 436 (1966). As is known by all in the legal profession and lay persons as well, the Supreme Court held that a suspect in police custody must be informed that he has the right to remain silent;

that anything he says can and will be used against him; that he has the right to consult with and to the presence of counsel during interrogation and that, if he is indigent, a lawyer will be appointed to represent him.

These familiar Miranda warnings are the prophylactic safeguard assuring at least a notice of these rights. The vast majority of cases raising Miranda issues involve this first level of Miranda protection—assuring that the warnings were given before questioning commences, and that the rights thereunder were then voluntarily waived.

However, a second part of the Miranda decision prescribed standards for situations where a suspect exercised, rather than waived, one of those rights- the right to remain silent or to the presence of counsel. *United States v. Alexander,* 428 A.2d 42 (D.C. App. 1981).

> At this point he has shown that he intends to exercise his Fifth Amendment privilege (to remain silent); *any statement taken after the person* invokes *his privilege cannot be other than the product of compulsion, subtle or otherwise.* Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to over-come free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogator must cease until an attorney is present (*Miranda,* supra at 474).
> (Emphasis added).

The issue presented in Mr. Endress' Petition for Writ of Habeas Corpus is the so-called "second level" of *Miranda* rights. Mr. Endress in this case was clearly in police custody, there can be no question of that. However, it is the violation of Mr. Endress' rights by Detective Hunt of the Hillsborough County Sheriff's Office after he had previously declined to talk to other law enforcement officials without an attorney that he complains of here.

By declining to speak to law enforcement officials without an attorney, Mr. Endress invoked his *Miranda* right to counsel,

which was blatantly violated by Detective Hunt when he covertly elicited incriminating statements from him during the two meetings at the Hillsborough County Jail.

Clearly the facts of this case do not establish a free and voluntary confession or a waiver of Mr. Endress' right to remain silent until such time as an attorney could be present.

In *Michigan v. Mosley,* 423 U.S. 96 (1975), the United States Supreme Court ruled that a defendant could, in some circumstances, waive a Miranda right to silence after it had been asserted. However, the Court carefully delineated the relevant facts controlling its decision that a voluntary waiver had been made. As a threshold matter it held that the basic objective was to assure that an in-custody defendant's assertion of a right to remain silent was *scrupulously honored.* The *Mosley* court relied on the following factors in reaching its decision:

> The Court relied on the following factors: 1) before the first questioning of the defendant, he was carefully advised of his Miranda rights, which he orally acknowledged; 2) the police immediately ceased questioning defendant when he indicated he wished it to stop, and made no attempt to resume questioning or ask him to reconsider; 3) there was a two hour break between the first interrogation and the second, performed at a different location, by a different officer, about a different crime; 4) a full and complete set of *Miranda* warnings were given before the second questioning began, including a full and fair opportunity for the defendant to examine his options; 5) finally, the subsequent questioning did not undercut the defendant's previous decision to remain silent because it involved an unrelated offense. *Id.* at 104.

In the instant case, two of the five Mosley factors were missing. Namely, factor (4) where it is clear that Detective Hunt did not give Mr. Endress a Miranda warning at either of the two custodial interrogation meetings; and factor (5) where the topic discussed by the detective and Mr. Endress was in fact the same criminal allegation that he had been arrested on, and *not* some other unrelated offense. Clearly under the guidance of the

Supreme Court in *Mosley* it was error to allow Mr. Endress' statements into evidence at the trial below.

This Court spoke specifically to the issue of waiver of Miranda rights in two other cases since its Mosley decision. First, the Court held in *North Carolina v. Butler,* 441 U.S. 374 (1979) that "interrogation" refers not only to express questioning of a suspect, but also to *its functional equivalent and any words or actions on the part of the police* that the police *should know* are reasonably likely to elicit an incriminating response from the suspect. The Court went onto hold that the perceptions of the *suspect,* rather than the *intent* of the police, is the primary focus for this determination.

Under these legal principles it is clear that Mr. Endress was illegally interrogated. It was error to admit Mr. Endress' statements in evidence against him.

CONCLUSION

Accordingly, the Petitioner respectfully moves this Court to grant the Petition for Writ of Certiorari and to require briefs on the merits and oral argument of this cause.

Respectfully submitted,

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APPENDICES

APPENDIX A

James R. ENDRESS,
Petitioner-Appellant

v.

Richard L. DUGGER, Director, Division of Corrections, State of Florida,
Respondent-Appellee.

No. 88-3612.

United States Court of Appeals,
Eleventh Circuit.

Aug. 21, 1989.

Bennie Lazzara, Jr., Henry Lee Paul, Tampa, Fla., for petitioner-appellant.

Charles Corces, Jr., Joseph R. Bryant, Asst. Attys. Gen., Tampa, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

FAY, Circuit Judge.

The petitioner James R. Endress appeals a federal district court order which denied his petition for a writ of habeas corpus. In the petition, Endress alleged that certain statements he made to a police detective while in police custody were improperly admitted into evidence since they were the product of an illegal interrogation in violation of his fifth and fourteenth amendment rights. In reviewing the habeas petition, the district court applied the § 2254(d) presumption of correctness to certain findings of the Florida appelate court and concluded that Endress' statements did not result from interrogation, but were made voluntarily. 28 U.S.C. § 2254(d) (1982). Accordingly, the court denied the habeas petition. On appeal, the petitioner contends that the district court improperly gave the state appellate court findings a presumption

of correctness under § 2254(d) and erred in finding that no interrogation took place. We disagree and hold that the district court properly applied the presumption of correctness to the state appellate court findings and correctly concluded that the petitioner's statements were not the product of an illegal interrogation.

I. Background

On October 28, 1981, Endress was arrested for a homicide which had occurred at a motel where he resided. Prior to the arrest, Endress' father requested that the Tampa police not question Endress until the father had an opportunity to talk with him at the police station. Upon arrest, the police advised Endress of his constitutional rights and Endress indicated he understood those rights. The police did not interrogate Endress because of the agreement with his father. The Tampa police booked Endress into the Hillsborough County Jail in the custody of the Hillsborough County Sheriff. However, jurisdiction of the investigation remained with the Tampa police department.

Detective Hunt of the Hillsborough County Sheriff's Office, noticed on a booking slip that Endress was in jail on a murder charge. As active members in the same church, Detective Hunt and Endress had been friends for about ten years. After seeing the booking slip, Detective Hunt sought and received permission to pay Endress a personal visit. Detective Hunt went to visit Endress on two occasions intending his visits to be personal. (R. 2-40-42). The detective did not repeat the *Miranda* warnings to Endress. During the second visit, Endress began making statements regarding the crime. When Endress made these statements, Detective Hunt advised Endress to stop and not to say anything to him regarding the crime. After the visit, Detective Hunt reported Endress' statements to his supervisor.

Prior to trial, Endress filed a motion to suppress the statements made to Detective Hunt. The trial court denied the motion after an evidentiary hearing.[1] At trial, Detective Hunt

1. In this motion, Endress sought to suppress the testimony of several officers regarding statements Endress made to them. The trial court held an evidentiary hearing to determine the admissibility of the testimony. After hearing testimony from several law enforcement officers, including Detective Hunt, the trial court denied the motion to suppress the statements made to Detective Hunt and to Detective Reynolds, but granted the motion to suppress statements made to Detective Larry Pinkerton. Although the parties have not filed a transcript of the entire trial, a transcript of the evidentiary hearing is part of the record. The trial court made no factual findings in ruling on the motion to suppress.

testified regarding the statements Endress made during the second visit. Detective Hunt testified that Endress stated that he and a friend were given about $170 to purchase a street gun. They purchased the gun for about $90 and were allowed to keep the balance of the money. (R. 2-54). Hunt also testified that he did not ask Endress anything regarding the homicide for which he was in jail and that Endress' statements were not in response to any questions. (R. 2-43, 46). Endress was convicted and sentenced to life in prison.

Endress appealed his conviction to the Florida Second District Court of Appeal claiming *inter alia* that Detective Hunt's testimony regarding Endress' statements was improperly admitted into evidence. Endress argued that the statements were elicited through custodial interrogation in the absence of *Miranda* warnings which violated Endress' fifth amendment right against self-incrimination. The appellate court found that the statements were not the product of interrogation and affirmed the state trial court's ruling. *Endress v. State,* 462 So.2d 872 (Fla. 2nd D.C.A.1985).

In concluding that the statements were not elicited through interrogation, the Second District Court of Appeal found that:

> Detective Hunt had not been in communication with any law enforcement agencies connected with the homicide. The key point is that he did not interrogate appellant [Endress] concerning the crime for which he was charged. He visited with him twice. On one or both occasions, appellant voluntarily told Detective Hunt about purchasing a "street gun" at another person's request and keeping a portion of the money furnished for the purchase. When Detective Hunt realized appellant might be telling him something about the crime, he advised him not to talk about it. He did not advise him of his constitutional rights because he did not interrogate him and did not want to be involved in the criminal investigation.
>
> This court has held that even under circumstances where there is the equivalent of an interrogation, it is not necessary to readvise a defendant of constitutional rights where there has been such advice previously given and understood. (citations omitted). We conclude from the record before us, however, that Detective Hunt's visits with appellant did not rise to the level of interrogation.

Id. at 873-874. Subsequently, Endress filed a petition for a writ of habeas corpus in federal district court. The petition renewed Endress' challenge to the admission of Detective Hunt's testimony. Accepting the recommendation of the magistrate, the district court afforded the Florida appellate court's finding that no express interrogation occurred a presumption of correctness under § 2254(d). The district court found that the question of whether the functional equivalent of interrogation occurred was a legal question meriting independent review. However, the court noted that other state appellate court findings supported the conclusion that no functional equivalent of interrogation took place and thus, denied relief. Endress appeals the district court's ruling arguing that the district court erred in applying the § 2254(d) presumption of correctness to the Florida appellate court's findings and erred in determining that Detective Hunt did not interrogate Endress.

II. Discussion

Section 2254(d) provides that state court factual determinations "shall be presumed to be correct" in a federal habeas corpus proceeding unless one of the eight enumerated exceptions applies.[2] 28 U.S.C. § 2254(d). In *Sumner v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 768, 66 L.Ed.2d 722 (1981), the Supreme Court held that the § 2254(d) presumption applies to both state trial and appellate court factual determinations. In this case we address first, whether the district court misapplied the § 2254(d) presumption to certain findings made by the state appellate court, and second, whether the district court properly determined that the police conduct in this case did not constitute the functional equivalent of interrogation in violation of Endress' fifth amendment right against self-incrimination.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court defined when an accused's fifth amendment right against self-incrimination is violated. The *Miranda* Court held that "when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning,

2. In pertinent part, 28 U.S.C. § 2254(d) provides:
"In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct unless . . . (8) the Federal court . . . concludes that such factual determination is not supported by the record as a whole."

the privilege against self-incrimination is jeopardized." *Id.* at 478, 86 S.Ct. at 1630. Therefore, the procedural safeguards of warning the suspect of his constitutional rights must be instituted to protect the privilege. *Id.* at 478-479, 86 S.Ct. at 1629-1630. These warnings are required before any statement may be admitted into evidence at trial which was elicited from a person in custody through interrogation. The Supreme Court emphasized, however, that "volunteered statements of any kind are not barred by the fifth amendment and their admissibility is not affected by our holding today." *Id.* at 478, 86 S.Ct. at 1630.

Since the warnings are required only in the situation of a custodial interrogation, many courts have addressed the issues of when a person is in "custody" or has been "interrogated" for the purposes of *Miranda.* These cases have recognized that while interrogation usually takes the form of direct questioning, there are situations where interrogation can occur through indirect means. For instance, in *Rhode Island v. Innis,* 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Supreme Court held that interrogation, for purposes of *Miranda,* occurs whenever a person is "subjected to either express questioning or its functional equivalent." *Id.* at 300-301, 100 S.Ct. at 1689. In other words, the term interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301, 100 S.Ct. at 1689.

In *Innis,* the suspect was arrested for a murder committed with a sawed-off shotgun. Upon arrest, the suspect requested counsel, thus invoking his sixth amendment rights. While the suspect was being transported in a car with three officers, one of the officers spoke to the other officers. The officer said that a school for handicapped children was located near the scene of the murder, and that "God forbid one of the children might find a weapon with shells and they might hurt themselves." *Id.* at 294-295, 100 S.Ct. at 1686. The suspect interrupted the conversation and told the officers where the gun was located.

The suspect sought to suppress the officers' testimony regarding his statement revealing the location of the gun. He claimed that the statements had been elicited in violation of his sixth amendment right to have counsel present during interrogation. The Supreme Court disagreed finding that no interrogation had taken place because the officers should not necessarily have

known that their conversation was "reasonably likely to elicit an incriminating response." *Id.* at 302, 100 S.Ct. at 1690.

Similarly, in *Arizona v. Mauro,* 481 U.S. 520, 107 S.Ct.1931, 95 L.Ed.2d 458 (1987), the Supreme Court addressed whether police conduct constituted the functional equivalent of interrogation. In this case, the suspect Mauro was in police custody for killing his son. After the police advised him of his *Miranda* rights, Mauro stated that he would not answer any questions without the presence of his lawyer. All questioning ceased. Mauro's wife then insisted on speaking with him. Although reluctant at first, the police permitted her to speak with her husband, but only in the presence of an officer and with a tape recorder running. One of the officers showed the wife into the room, seated himself at the desk, and put a tape recorder in plain sight on the desk. During the conversation, Mauro made incriminating remarks to his wife and the tape of the conversation was used at trial. Mauro was convicted and sentenced to death.

On appeal, Mauro claimed that the police's actions constituted interrogation or its functional equivalent which violated his sixth amendment right to have his counsel present during interrogation. Thus, the statements were elicited in violation of *Miranda* and improperly admitted into evidence. The Supreme Court disagreed holding that the police action did not constitute interrogation. The Court found that the tape recording showed that the officer present did not ask the accused any questions. *Id.* at 527, 107 S.Ct. at 1935. Further, the officer's presence was not improper and no evidence was presented to indicate that the officers had sent the wife in to see her husband for the purpose of eliciting incriminating statements. *Id.* The Court stated that "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.* at 529, 107 S.Ct. at 1936. Since Mauro was "not subjected to compelling influences, psychological ploys, or direct questioning," his volunteered statements could not be considered the result of police interrogation. *Id.*

The Court's analysis in *Innis* and *Mauro* implies that whether a person has been subjected to the functional equivalent of interrogation is more than simply a finding of historical fact.[3] A court must evaluate the facts to determine whether the police

3. *Innis* and *Mauro* deal with a violation of the sixth amendment right to counsel, rather than the fifth amendment right against self-incrimination involved in this case. However, because the issue of whether interrogation occurred is similar under both the sixth and fifth amendments, we find these cases helpful in defining the nature of the interrogation issue.

should have known their conduct was reasonably likely to elicit an incriminating response. Accordingly, whether the functional equivalent of interrogation has taken place is a mixed question of law and fact. Thus, this ultimate issue is not entitled to the § 2254(d) presumption of correctness; rather as a question of law, the issue merits independent consideration in a federal habeas corpus proceeding. *See e.g. Miller v. Fenton,* 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) (the issue of the voluntariness of a confession is not an issue of fact entitled to the § 2254(d) presumption, but is a legal question meriting independent review).

In this case, the state appellate court found that Detective Hunt had not directly questioned Endress regarding the crime, thus, no express interrogation occurred. The state appellate court's finding that no express interrogation occurred in the sense that no questions were asked is a factual finding. Thus, we hold that the district court properly ruled that this finding was entitled to the § 2254(d) presumption.

We now evaluate the facts to determine whether Endress was subjected to the functional equivalent of interrogation. The state appellate court found that 1) Detective Hunt was a close friend of Endress; 2) Detective Hunt visited Endress to inquire on his well-being and not at the direction of any officer connected with the criminal investigation; 3) Detective Hunt had not been in contact with any law enforcement agencies connected with the investigation; and 4) Detective Hunt advised Endress not to talk to him about the crime when he realized Endress could be making statements regarding the crime. These findings by the state appellate court are subsidiary factual findings bearing on the ultimate issue of whether the functional equivalent of interrogation occurred. *See Miller,* 474 U.S. at 112, 106 S.Ct. at 450; *Ballard v. Johnson,* 821 F.2d 568 (11th Cir.1987). Since the petitioner has not established that these findings are not supported by the record or that any other of the enumerated exceptions to § 2254(d) exists, we hold that these findings are entitled to the § 2254(d) presumption.

Our independent review of these facts leads us to conclude that Endress was not subjected to the functional equivalent of interrogation. Like the situation in *Mauro,* the investigating officers in this case in no way arranged the meeting to elicit an incriminating response from the suspect. The meeting was arranged by Detective Hunt who had no connection with the investigation and who visited Endress in the capacity of a personal

friend. Detective Hunt in no way intended to elicit any information from Endress regarding the crime. Unlike the officer in *Innis*, Detective Hunt made no statement regarding the crime or its circumstances to the suspect. Hence, the facts in this case do not even rise to the level of those in *Innis* which the Supreme Court held not to constitute interrogation. We do not believe the officers in this case should have known that Detective Hunt's visit was reasonably likely to elicit an incriminating response.

Based on the factual findings of the state appellate court which we presume correct, we find that Endress' statements were voluntary and not elicited through interrogation or its functional equivalent. To hold otherwise would be "completely at odds" with the findings of the state court. *Kuhlmann v. Wilson*, 477 U.S. 436, 460, 106 S.Ct. 2616, 2630, 91 L.Ed.2d 364 (1986).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-3612

D.C. Docket No. 85-1238

JAMES R. ENDRESS,
Petitioner-Appellant,

versus

RICHARD L. DUGGER, Director,
Division of Corrections, State of Florida,
Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcipt of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be and the same is hereby AFFIRMED.

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*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

Entered: August 21, 1989
For the Court: Miguel J. Cortez, *Clerk*
By: Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: DEC 20 1989

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 85-1238-Civ-T-13

JAMES R. ENDRESS,
Petitioner,

v

LOUIE L. WAINWRIGHT, Director,
Division of Corrections, State of Florida,
Defendant.

O R D E R

This cause came on for consideration upon the filing of a petition for a writ of habeas corpus by the petitioner.

The matter was considered by the United States Magistrate, pursuant to the general order of assignment, who has filed her report recommending that the petition be denied.

Upon consideration of the report and recommendation of the magistrate and upon the Court's independent examination of the entire file, the magistrate's report is adopted and confirmed and made a part hereof, and it is

ORDERED:

1. That the petition for writ of habeas corpus is DENIED

2. Each party shall bear its own costs.

DONE AND ORDERED in Chambers in Tampa, Florida this 13th day of May, 1988.

GEORGE C. CARR
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No: 85-1238-CIV-T-13

MAR 9 4:27 PM '88

JAMES R. ENDRESS,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, Director,
Division of Corrections, State of Florida,
Respondent.

REPORT AND RECOMMENDATION

THIS CAUSE comes on for consideration of a petition for writ of habeas corpus filed on behalf of a state prisoner pursuant to Title 28, United States Code, Section 2254. Following a jury trial, petitioner was convicted of first-degree murder and sentenced to life imprisonment with a 25-year minimum mandatory term.

Petitioner, through counsel, raises a sole ground for relief: that his Fifth and Fourteenth Amendment rights were violated by an illegal custodial interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) which resulted in use of the statements at trial against him.[1]

This issue was one of three issues raised by petitioner in the direct appeal of his conviction. *Endress v. Florida*, 462 So. 2d 872 (2nd D.C.A. Fla. 1985).

The preliminary question of whether petitioner is entitled to an evidentiary hearing concerning his claim was addressed in

1/ Neither party has filed a transcript of the entire trial proceedings. It appears, however, the statements challenged by petitioner in this action were material to the state's case against petitioner at trial. Petitioner points out that during its deliberations, the jury requested to have read back to it the testimony of the officer to whom petitioner made the challenged statements.

an order of the undersigned magistrate dated July 9, 1987 which denied the request for a hearing. (Dkt. 21). Oral argument on the issues presented has been held.

The trial court held an evidentiary hearing on the motion to suppress prior to trial. A transcript of the evidentiary hearing is part of the record. After hearing testimony from several law enforcement officers, including Detective Don Hunt whose testimony is the subject of this habeas petition, the trial court denied the motion to suppress statements made to Detective Hunt and another officer, a Detective R. J. Reynolds, but granted the motion to suppress statements made to a Detective Larry Pinkerton (Dkt. 8, Ex. 2, p. 129, 131).

Although trial court made no factual findings in ruling on the motion to suppress, the appellate court, on direct appeal of petitioner's conviction did make factual findings which are pertinent to the issues presented in this habeas petition.

These factual findings of the appellate court are entitled to a presumption of correctness absent certain exceptions. 28 U.S.C. § 2254(d). *Sumner v. Mata*, 449 U.S. 539 (1981); *Townsend v. Sain*, 372 U.S. 293 (1963); *Ballard v. Johnson*, 821 F.2d 568 (11th Cir. 1987).

The opinion of the Second District Court of Appeal contains the following pertinent factual findings:

> Appellant was arrested at approximately 7:15 a.m. on October 28, 1981, for a homicide that had occurred at a motel within the city limits of Tampa on October 13, 1981. At the time of the homicide, appellate was a resident of the motel. Appellant is an adult male. Prior to his arrest, his father had requested that the Tampa police not talk with him until the father could talk with him at the Tampa Police Department. The arresting officers honored the father's request. They also advised appellant of his constitutional rights at the time of his arrest and he indicated he understood those rights. Later, appellant was booked into the Hillsborough County Jail on a charge of first degree murder. The homicide investigation continued to be within the jurisdiction of the Tampa Police Department, even though appellant was booked into the Hillsborough County Jail in the custody of the Hillsborough County Sheriff.

> After being booked into the Hillsborough County Jail, a Detective Hunt with the sheriff's office, noticed on a booking slip that appellant was in jail on the charge of first degree murder. Detective Hunt had been good friends with appellant and his family for better than ten years. They were active members of the same church. After seeing the booking slip, Detective Hunt sought permission for a personal visit with appellant to inquire of his well-being.
>
> Detective Hunt had not been in communication with any law enforcement agencies connected with the homicide. The key point is that he did not interrogate appellant concerning the crime for which he was charged. He visited with him twice. On one or both occasions, appellant voluntarily told Detective Hunt about purchasing a "street gun" at another person's request and keeping a portion of the money furnished for the purchase. When Detective Hunt realized appellant might be telling him something about the crime, he advised him not to talk about it. He did not advise him of his constitutional rights because he did not interrogate him and did not want to be involved in the criminal investigation.
>
> This court has held that even under circumstances where there is the equivalent of an interrogation, it is not necessary to readvise a defendant of constitutional rights where there has been such advice previously given and understood. *State v. Williams*, 386 So.2d 27 (Fla. 2d DCA 1980). We conclude from the record before us, however, that Detective Hunt's visits with appellant did not rise to the level of interrogation. *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Ashley v. State*, 265 So.2d 685 (Fla. 1972); *Spikes v. State*, 405 So.2d 430 (Fla. 3d DCA 1981). The statements voluntarily made to him were therefore admissible. 462 So.2d at 873-874.

The ultimate issue of whether the confession was obtained in violation of petitioner's Fifth and Sixth Amendment rights is a mixed question of law and fact to which the state court determination is not entitled to deference. *Miller v. Fenton*, 474 U.S. 104, *cert. denied*, _____ U.S. _____, (1987); *Brewer v. Williams*, 430 U.S. 387 (1977).

Voluntary incriminating statements not made in response to interrogation are admissible regardless of whether a defendant in custody has asserted his *Miranda* rights. See e.g. *United States*

v. Suggs, 755 F. 2d 1538, 1541 (11th Cir. 1985).

In *Rhode Island v. Ennis*, 446 U.S. 291 (1980) the Court held that interrogation includes not only "express questioning but also, *any words or actions on the part of the police* (other than those normally attendant to arrest and custody) *that the police should know are reasonably likely to elicit an incriminating response from the suspect*" *Id.* at 301 (Footnotes omitted) (emphasis supplied).

The factual finding of the appellate court that Detective Hunt did not interrogate petitioner concerning the crime for which he was charged demonstrates that no express questioning occurred. This finding negates the first part of the *Rhode Island v. Ennis* test.

Other findings made by the court also support a conclusion that no functional equivalent of interrogation took place: (1) Hunt, though a law enforcement officer, was a close friend of the family; (2) the purpose of his personal visit was to inquire about petitioner's well-being; (3) he had not been in communication with any law enforcement agencies connected with the homicide; and (4) he advised petitioner not to talk when he realized petitioner might be telling him something about the crime.

Petitioner has not established that the factual findings of the state court are erroneous or not supported by the record, that the evidentiary hearing afforded him in state court was unfair or that any other exceptions ennumerated in Section 2254(d) apply. See *Hance v. Zant*, 696 F.2d 940, 946 (11th Cir. 1983).

These findings, examined independently and without deference to the state court's legal conclusion, establish that the statements made by petitioner to Detective Hunt were spontaneous and not the result of interrogation, explicit or implicit. To hold, as petitioner suggests, that the record supports a conclusion that Hunt deliberately elicited incriminating statements from petitioner under the guise of friendship would be "completely at odds" with the appellate court's findings and the

language and intent of section 2254(d).[2] See *Kuehlmann v. Wilson*, 477 U.S. _____; 106 S. Ct. 2616, 91 L.Ed.2d 364 (1986). The admission of the statements at trial did not violate petitioner's Fifth and Sixth Amendment rights.

Since the statements were spontaneous and not the product of interrogation, it is unnecessary to determine whether petitioner asserted his *Miranda* rights at the time of arrest as he contends and did not waive his rights prior to being visited by Detective Hunt.[3] It is noted, however, that the Second District Court of Appeal found that petitioner was advised of his constitutional rights upon arrest and indicated he understood those rights.

Once informed of *Miranda* rights, a defendant has the burden of asserting in some manner that he wishes to remain silent. *U.S. v. Alegria*, 721 F.2d 758, 761 (11th Cir. 1983). It appears that petitioner's *Miranda* argument is also without merit.

After careful consideration of the record and arguments advanced by both parties, the undersigned magistrate concludes that petitioner has not established that his constitutional rights were violated by the admission of his spontaneous statements to Detective Hunt at trial.

Based on the foregoing, it is respectfully

RECOMMENDED that:

(1) The Petition for Writ of Habeas Corpus be DENIED.

ELIZABETH A. JENKINS
United States Magistrate

2/Petitioner contends that other facts not discussed by the appellate court but contained in the record support a finding of implicit interrogation by Detective Hunt: the detective was in full uniform, he stated that he would help petitioner out any way he could, he visited him on two occasions and he made an interoffice memo reporting his conversations with petitioner to his supervisor. These facts are in the record but do not impugn the facts which the appellate court found pertinent.

3/Petitioner's counsel cites to portions of the transcript which indicate that petitioner asserted his right to counsel (T218-219, 224-225) The cited pages indicate, however that the arresting officer refrained from interrogating petitioner (age nineteen at the time) due to an agreement with petitioner's father. The testimony also indicates that when the father arrived at the police station, the father said "I would rather my son talk to an attorney first." (T 225) Counsel's assertion that the cited pages demonstrate that petitioner asserted his right to counsel is misleading.

Dated: March 9, 1988.

NOTICE TO PARTIES

Title 28, U.S.C., 636 and Local Rule 6.02(a) of this court permits any party to object to these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. Any objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections.

Any objections shall be filed with the clerk of the court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within five (5) days after being served with a copy thereof. Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. *U.S. v. Warren*, 687 F.2d 347 (11th Cir. 1982); *Nettles v. Wainwright*, 656 F.2d 986 (5th Cir. 1981).

APPENDIX E

JAMES R. ENDRESS, *Appellant,*

v.

STATE OF FLORIDA, *Appellee.*

No. 83-2295.

District Court of Appeal of Florida,
Second District.

Jan. 30, 1985.

Rehearing Denied March 29, 1985.

Norman S. Cannella of Norman S. Cannella, P.A., Tampa, and Bennie Lazzara, Jr., of Bennie Lazzara, Jr., P.A., Tampa, for appellant.

Jim Smith, Atty. Gen., Tallahassee, and James H. Dysart, Asst. Atty. Gen., Tampa, for appellee.

CAMPBELL, Acting Chief Judge.

Appellant appeals his conviction of first degree murder and resulting sentence to life imprisonment without eligibility for parole for twenty-five years. We affirm.

Appellant raises three points on appeal. One of his points concern the scope of the testimony of an expert witness. A Dr. Miller, an associate Hillsborough County Medical Examiner, was called and qualified as a medical expert to establish the cause of death of the victim. His opinion was that death was by strangulation, caused by multiple injuries on the victim's neck. In addition, he offered his opinion as to the number of possible assailants and their relative strength compared to the victim. We conclude that the matters concerning which the expert testified were within his expertise. The trial court has broad discretion concerning the range of subject matter upon which experts may testify and absent clear showing of error, that exercise of discretion will not be disturbed on appeal. *Johnson v. State,* 393 So.2d 1069 (Fla.1980).

Another of appellant's points also rests largely within the trial court's discretion. That point dealt with the trial court, at the state's request, calling a witness favorable to the state as the court's witness. The witness's trial testimony was expected to contradict previous statements given to defense counsel. It was within the trial court's discretion, under those circumstances, to call the witness as the court's witness. *McCloud v. State,* 335 So.2d 257 (Fla.1976); *Delanie v. State,* 362 So.2d 689 (Fla. 2d DCA 1978).

Appellant's remaining point concerns the trial court's refusal to suppress certain of his statements made subsequent to his arrest. While there are cases which fall on both sides of the issue of suppression under somewhat similar circumstances, we feel that the circumstances of this case clearly support the trial court's refusal to suppress.

Appellant was arrested at approximately 7:15 a.m., on October 28, 1981, for a homicide that had occurred at a motel within the city limits of Tampa on October 13, 1981. At the time of the homicide, appellant was a resident of the motel. Appellant is an adult male. Prior to his arrest, his father had requested that the Tampa police not question appellant until the father could talk with him at the Tampa Police Department. The arresting officers honored the father's request. They also advised appellant of his constitutional rights at the time of his arrest and he indicated he understood those rights. Later, appellant was booked into the Hillsborough County Jail on a charge of first degree murder. The homicide investigation continued to be within the jurisdiction of the Tampa Police Department, even though appellant was booked into the Hillsborough County Jail in the custody of the Hillsborough County Sheriff.

After being booked into the Hillsborough County Jail, a Detective Hunt with the sheriff's office, noticed on a booking slip that appellant was in jail on the charge of first degree murder. Detective Hunt had been good friends with appellant and his family for better than ten years. They were active members of the same church. After seeing the booking slip, Detective Hunt sought permission for a personal visit with appellant to inquire of his well-being.

Detective Hunt had not been in communication with any law enforcement agencies connected with the homicide. The key point is that he did not interrogate appellant concerning the crime

for which he was charged. He visited with him twice. On one or both occasions, appellant voluntarily told Detective Hunt about purchasing a "street gun" at another person's request and keeping a portion of the money furnished for the purchase. When Detective Hunt realized appellant might be telling him something about the crime, he advised him not to talk about it. He did not advise him of his constitutional rights because he did not interrogate him and did not want to be involved in the criminal investigation.

This court has held that even under circumstances where there is the equivalent of an interrogation, it is not necessary to readvise a defendant of constitutional rights where there has been such advice previously given and understood. *State v. Williams,* 386 So.2d 27 (Fla. 2d DCA 1980). We conclude from the record before us, however, that Detective Hunt's visits with appellant did not rise to the level of interrogation. *Halliwell v. State,* 323 So.2d 557 (Fla.1975); *Ashley v. State,* 265 So.2d 685 (Fla.1972); *Spikes v. State,* 405 So.2d 430 (Fla. 3d DCA 1981). The statements voluntarily made to him were therefore admissible.

Finding no error in regard to any of appellant's three points on appeal, we affirm.

LEHAN, J., and PACK, R. WALLACE, Associate Judge, concur.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3612

DEC 7 1989

JAMES R. ENDRESS,
Petitioner-Appellant,

versus

RICHARD L. DUGGER, Director,
Division of Corrections, State of Florida,
Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING
(December 7, 1989)

BEFORE: FAY and HATCHETT, Circuit Judges, and HOFFMAN*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by James R. Endress, appellant, is denied.

ENTERED FOR THE COURT:

Peter Fay
United States Circuit Judge

*Honorable Walter E. Hoffman, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.